

JAMES D. & TED L. PERKINS

IBLA 72-324

Decided September 18, 1973

Appeal from a decision of the Utah State Office granting approval for a pipeline right! of! way, but denying application U 10013 for a right! of! way for a diversion ditch, pursuant to the Act of March 3, 1891.

Affirmed as modified.

Rights! of! Way: Act of March 3, 1891

No right! of! way for the purpose of irrigation under the Act of March 3, 1891, is granted until the Department has given approval to a map submitted by the applicant.

APPEARANCES: James D. Perkins and Ted L. Perkins, pro se.

OPINION BY MR. HENRIQUES

James D. and Ted L. Perkins have appealed the Utah State Office, Bureau of Land Management, decision of January 14, 1971, denying their application, U 10013, for a right! of! way for a ditch, pursuant to the Act of March 3, 1891, 26 Stat. 1101, 43 U.S.C. §§ 946-9 (1970), across public domain lands in secs. 33, 34, T. 31 S., R. 5 W., and secs. 3, 11, 14, T. 32 S., R. 5 W., S.L.M. The decision, itself, gave no reason to support rejection, except that the District Manager had so recommended.

By letter of September 15, 1969, the appellants applied for a right! of! way under the Act of March 3, 1891, 26 Stat. 1101, 43 U.S.C. §§ 946 et seq., for an existing diversion ditch to irrigate land consisting of E 1/2 SW 1/4, W 1/2 SW 1/4 SE 1/4 of sec. 13, T. 32 S., R. 5 W., S.L.M. A map was submitted with this letter, as well as evidence of certain water rights. While appellants expressly requested a right! of! way under the Act of March 3, 1891, they prefaced this application with a declaration that they "submit this letter for the purpose of having an existing irrigation ditch right! of! way recorded." The right! of! way sought was for a pipeline running approximately 3,470 feet through the SE 1/4 sec. 14, and the SW 1/4 SW 1/4 sec. 13,

T. 32 S., R. 5 W., S.L.M. The ditch continued from a point in sec. 14 roughly northward through secs. 14, 11, and 2, turning northwestward through sec. 3 and thence passing through secs. 34 and 33, T. 31 S., R. 5 W., S.L.M., ending at a dam site in SW 1/4 sec. 33.

On November 5, 1969, the BLM Acting District Manager, Cedar City, Utah, recommended the grant of the entire right! of! way subject to certain stipulations. One of these stipulations required the construction of a diversion structure at the dam site to adequately control the water to be conveyed through the ditch. The Land Office so advised the appellants and indicated that the Cedar City District Office would provide the necessary specifications upon request.

No action by any party was undertaken thereafter until November 10, 1971, when the District Manager reminded the appellants that their right! of! way application was still pending. The record fails to show any response by the appellants. On December 15, 1971, the Acting District Manager, in a memorandum to the State Director, recommended that the right! of! way be denied insofar as it pertained to the ditch. 1/ Such denial would remove the necessity of constructing a diversion structure at the dam site in sec. 33. By decision of January 14, 1972, the State Office granted a right! of! way for the pipeline segment listed in the application, but rejected the application as to the diversion ditch.

The appellants timely filed notice of appeal. In this notice they contended that the ditch was already in existence and declared that "[w]e feel and have been advised that the ditch of long existence has established a right! of! way." They asserted that their right to divert water through the existing ditch was based on their acquisition of rights adjudicated by the "Cox Decree." 2/

Subsequent to the notice of appeal, the District Manager made a report to the State Director, stating that the actual existence

1/ The reason given for this recommendation was that reconstruction of the ditch would create an extensive and highly visible scar. We do not pass upon the correctness of this reason at this time as there is insufficient information in the record to support such a reason.

2/ The "Cox Decree" is the name given to the adjudication by District Judge Leroy H. Cox of water rights for the Sevier River, dated March 23, 1939. The water claimed by the appellant would be diverted within the Sevier River system drainage area.

of the ditch was questionable as it was mostly filled with dirt and vegetation; that no right to use the right! of! way had been granted under the 1891 Act to appellants since the mere filing of a map conveys no rights until the same is approved by the Department; and that it is questionable whether appellants actually hold the water right claimed. This Board afforded appellants the opportunity to comment on the statements of the District Manager, but no response was received.

The subject application was made under the 1891 Act, which provides that a map of the right! of! way must be approved by the Secretary of the Interior before any rights vest in the grantee. There is no record that approval has been given to any ditch right! of! way affecting the subject lands in response to any application by these appellants or any other person. The Act further provides that in order to secure the benefits thereof, "[the applicant] shall, within twelve months after location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file [in the Land Office] * * * a map of its canal or ditch and reservoir." 43 U.S.C. § 947 (1970). The portion of land traversed by the purported ditch in T. 31 S., R. 5 W., S.L.M., was surveyed in 1911, the remaining portion in T. 32 S., R. 5 W., was surveyed in 1962. Thus, under the applicable provisions of the 1891 Act, an application for the ditch right! of! way should have been filed in the Land Office several years before 1969.

In any event, although appellants apparently included a sketch map with their application, the map does not satisfy the requirements in the departmental regulations, 43 CFR 2802.1-5. Therefore, the application for right! of! way should have been summarily rejected. The State Office decision is so modified. 3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified. This action will

3/ This decision is only determinative of rights under the 1891 Act. We do not purport to make any ruling of possible rights under the Act of July 26, 1866, 30 U.S.C. § 51, 52; 43 U.S.C. § 661 (1970). To be recognized under that Act, there would have to be a showing of a vested water right and construction of the ditch prior to the 1891 Act and other Acts which have been held to have superseded the 1866 Act. See Solicitor's Opinion, 58 I.D. 29 (1942). There would also have to be a showing that there has been no abandonment. The appellants have made no such showings.

not be prejudicial to consideration of a complete and correct application under the 1891 Act.

Douglas E. Henriques
Member

We concur:

Joan B. Thompson
Member

Anne Poindexter Lewis
Member

